

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SERVANDO MARTINEZ
LUCIO ROJAS

Claimants

VS.

UTILITY CONTRACTORS, INC.

Respondent

Docket Nos. 1,050,856

1,050,872

AND

ZURICH AMERICAN INSURANCE

Insurance Carrier

ORDER

Respondent and its insurance carrier request review of the July 13, 2010 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery (ALJ).

ISSUES

The ALJ found that the claimants' accidental injuries arose out of and in the course of their employment with respondent. Accordingly, respondent was ordered to pay their medical bills and treatment with Dr. Klaumann along with weekly benefits commencing March 11, 2010.

The respondent requests review of this decision asserting that claimants' injuries do not constitute compensable injuries. Rather, both claimants were involved in a motor vehicle accident while commuting to and from their assigned work site and as a result, they are not entitled to benefits under the Workers Compensation Act (Act).

The claimants argue that the ALJ should be affirmed as they maintain that travel to a distant work site was necessary and inherent to their normal work activities. And as such, they were within the scope and course of their employment when they were involved in an automobile accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

These docketed claims were consolidated for purposes of a preliminary hearing as they stem from a single automobile accident. The ALJ's preliminary hearing Order succinctly and accurately set forth the facts and circumstances surrounding this accident, the claimants' employment with respondent as well as the applicable statute, K.S.A. 44-508(f). That recitation is specifically adopted herein and only those facts that are pertinent to this decision will be restated.

This consolidated claim presents a difficult scenario. There is no dispute that both claimants were injured in a vehicular accident while driving home from Sedan, Kansas. Both claimants had been assigned by respondent to work in Sedan, Kansas for a long term project.¹ As it had in the past, respondent had made arrangements for its employees to spend the night near the work location,² provided a daily meal and room stipend for those staying locally, and even made a van available to the workers to transport them to the site.³ If the workers stayed on site, they were entitled to the stipend *but if they elected to commute to and from the site, they were not entitled to the stipend.*

Both claimants determined, based on the information given to them by their supervisor, that there was insufficient room for them at the Ranch House. Thus, the two of them decided that they would commute to and from the job site in Sedan, Kansas. But for whatever reason, their supervisor, Curtis Martin, approved payment of the stipend to each of claimants for the week of the accident. In fact, he had been approving those payments since the job began, although he concedes that neither claimant was entitled to the additional monies if they were not staying on site in Sedan. He specifically denies that he knew both claimants were commuting on a daily basis although he admitted that he had heard a rumor at one point before the accident that they were.⁴

¹ The job site in Sedan, Kansas is located approximately 90 miles from Wichita. Thus, the distances claimants traveled in a single day was 180 miles.

² There was a local scout camp, the Ranch House, that had cabins which were rented for the workers. However, the capacity for these cabins was limited and apparently only a few spaces remained when the claimants and the rest of their crew were assigned to the Sedan site.

³ On this particular job, the stipend was comprised of \$22.00 per day for food and \$45 per day for the hotel/cabin. There was no charge for riding in the company-owned van to the job site.

⁴ P.H. Trans. at 74.

Both parties agree that none of the employees were paid for their time while off the job. Thus, even as claimants (or most of the other employees for that matter)⁵ drove to or from Sedan, Kansas for work they were not compensated for their time, unless overnight accommodations were available. Only when they began working in Sedan did they receive their normal wages.

On the day of the accident, claimants left the job site and started on their way home to Wichita. They were involved in an accident and shortly after the impact, Curtis Martin came upon the accident. Both claimants sustained injuries but respondent has refused to provide benefits under the Act, claiming that the two employees were commuting to the job and under K.S.A. 44-508(f), this accident is not compensable.

K.S.A. 2009 Supp. 44-508(f) provides as follows:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2009 Supp. 44-508(f) is seen as a codification of the going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.⁶ In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the

⁵ The employee that drove the company-owned van to the job site would receive his hourly wage. But he would be the only one being compensated for services during that drive.

⁶ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

employment.⁷

The ALJ noted the statute and went on to discuss the case law that has emerged over the years. The Courts have long since acknowledged that in certain instances where travel is required as part and parcel of an employees job, any injuries that occur during that travel are, in spite of the rule set forth above, considered compensable.⁸ This was often the case in instances involving workers who serviced oil wells, traveling place to place.⁹ This concept was refined over time and sometimes referred to as the “exception” to the going and coming rule.¹⁰ But as is often the case in the law, factual scenarios always present themselves that test the validity of even the most well-crafted legal theories. Such is the case with the going and coming rule and what has emerged as the “exception” to that rule.

The ALJ reasoned as follows:

A fixed-situs employee does travel to the job site in order to perform the business of the employer, but the Act excises this activity from the scope of compensation in order to keep the employer’s burden manageable. *In light of the cases cited above, when determining whether a given daily commute is within the scope of the Act, an increased risk to the employee or an increased utility to the employer is a useful indicator of whether the inherent travel exception should apply...*¹¹ (emphasis supplied)

. . .

As noted, the normal rule in Kansas is that employees who suffer injuries on the way to and from work do not fall with [sic] the purview of the Workers Compensation Act. The exceptions are noted above, one of those being whether travel was an integral part of the job. In *Butera*, op cit. the Court of Appeals provided a useful measure in determining such by measuring the increase [sic] utility of the employer or whether the employee suffered an increased risk of traveling. The Court of Appeals stated, “at the moment he was injured, (Butera) faced no greater risk than

⁷ *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

⁸ See e.g., *Kennedy v. Hull*, 130 Kan. 191, 195, 285 P. 536 (1930).

⁹ See e.g., *Bell v. A.D. Allison Drilling Co.*, 175 Kan. 441, 264 P.2d 1069 (1954)

¹⁰ See e.g., *Brobst v. Brighton Place North*, 24 Kan. App.2d 766, 955 P.2d 1315(1997); *Messenger v. Sage Drilling Co.*, Kan. App.2d 435, 680 P.2d 556 (1984); *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

¹¹ ALJ Order (Jul. 13, 2010) at 2, citing *Butera v. Fluor Daniel Const. Corp.*, 28 Kan. App.2d 542, 18 P.3d 278 (2001).

other commuters who were traveling from their permanent residence. Similarly, Fluor did not enjoy some benefit over and above what it would have received had Butera been a local resident." *Butera*, op cit. pp. 246-47.¹²

The ALJ ultimately concluded that because the employer had some difficulty finding local employees, had taken some steps to find local housing for the 4 nights the employees were allowed to stay close to the work site, had failed to take any efforts to ensure that employees (such as these claimants) actually stayed in Sedan, Kansas if they were receiving the monetary stipend, claimants injuries were compensable.¹³ Although he did not expressly conclude that travel was part and parcel of their job duties, the Order seems to implicitly include that finding as compensation was granted.

This Board Member has carefully reviewed the record presented to the ALJ and after considering the relevant case law, has determined that these facts lend themselves to a conclusion that at the time of their accident, these claimants were commuting home from their job site, much like any other employee. And while it is true that they were exposed to risk while on the highways while driving to and from the work site in Sedan, Kansas, that decision to drive *was their choice*. Their decision to drive exposed them to additional risk - with each mile driven they exposed themselves to additional risk. This was a risk that could have been avoided if they had stayed in Sedan. Driving to and from the job site each day was not required by the respondent nor was it prohibited. In fact, respondent took steps to find a place for the claimants to stay overnight while assigned to the project in Sedan. If the employee elected to stay in Sedan, there would be a stipend paid to offset the costs for the hotel and meals. *Those monies were not to be paid if the employee did not stay in Sedan*. And yet these claimants received the weekly stipend with their supervisor's approval. Nonetheless, this Board Member does not believe that respondent's failure to monitor the supervisor's decision to approve those stipend payments renders the claimants' decision to commute to the job site, which directly led to the automobile accident, into a compensable injury.

Admittedly, there is a credible argument to support the ALJ's Order. But the determination of whether and when any given accident falls within or outside of an employee's course and scope of employment is necessarily fact driven and can turn on what seems, at first blush, as minutia. Nonetheless, this Board Member finds that the claimants' accidental injury did not arise out of and in the course of their employment. Accordingly, the ALJ's Order is reversed.

¹² *Id.*

¹³ *Id.* at 3.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated July 13, 2010, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Bradley R. Pistotnik, Attorney for Claimant (Servando Martinez)
Brian D. Pistotnik, Attorney for Claimant (Lucio Rojas)
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

¹⁴ K.S.A. 44-534a.